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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1990

PEDRO J. CHARRIA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, under the Sixth Amendment to the Constitution of the United States, an indicted defendant who has been given the *Miranda* warnings but not informed of the indictment against him may waive the right to counsel when consenting to custodial questioning and a search of his home.

2. Whether the Fifth Amendment to the Constitution of the United States protects a defendant's destruction of incriminating but self-created documents before he has knowledge of the existence of a criminal investigation or prosecution against him, or whether such act may be considered an "obstruction of justice" for purposes of enhancing his offense level under the Federal Sentencing Guidelines.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Pedro J. Charria petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed the judgment of conviction entered against him in the United States District Court for the Southern District of New York. Petitioner was convicted after a jury trial of conspiracy to distribute and to possess with intent to distribute cocaine, in violation of 21 U.S.C. Secs. 846 and 841(a)(1), and of money laundering, in violation of 18 U.S.C. Secs. 1956(a)(1)(B)(i) and 2, and was sentenced to concurrent terms of imprisonment of twenty five and ten years, respectively.

OPINIONS BELOW

The judgment of the Court of Appeals was issued on February 5, 1991, following the denial of petitioner's timely petition for re-hearing, and is reproduced in the Appendix to this Petition at A-1. The Court of Appeals' opinion, issued on December 3, 1990, is reproduced in the Appendix A-2, and is reported at 919 F.2d 942. The unpublished opinions of the District Court with respect to one of the questions presented for review are reproduced in the Appendix at A-19 and A-22.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part,

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

The Fifth Amendment to the Constitution of the United States provides in pertinent part,

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law;

Section 3C1.1 of the Sentencing Guidelines of the United States Sentencing Commission, provides

> 3C1.1 *Willfully Obstructing or Impeding Proceedings*
>
> If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the offense level from Chapter Two by 2 levels

Application Note 3 of Section 3C1.1 of the Sentencing Guidelines provides

> This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt is not a basis for application of this provision.

STATEMENT OF THE CASE

In the summer of 1986, on the basis of information obtained from a confidential informant, the Customs Service began an investigation into the suspected cocaine distribution and money laundering activities of one Gonzalo Mora, Jr., a Columbian citizen who resided in Medellin, Columbia. In early December of 1986, as part of that investigation, *Robert Mazur* and Emil Abreu, special agents of the Customs Service, assumed the rule of Robert "Musella" and "Emilio Dominguez", respectively, Florida mortgage brokers and financial analysts. They were introduced to Mora in Tampa by the confidential

informant. (T-59)[1] Mazur represented himself as an officer of Financial Consulting, Inc., a local consulting firm, and as a partner in Dynamic Mortgage Brokers, located in Miami. (T-61)

With Abreu acting as interpreter, Mora told Mazur that he had a number of "clients" in Columbia who generated large amounts of cash in the United States through cocaine distribution and needed a method of getting the cash out of the United States. For the previous two years Mora had been servicing his clients by providing bank accounts of "legitimate" businesses into which the cash was deposited and from which it ultimately was wire-transferred to bank accounts in foreign countries, principally Panama. The foreign accounts were in the names of other legitimate businesses to which either the clients or their associates had access, or on which checks would be written and then sold on "the black market". (T-73-74)

After a series of meetings, More and Mazur agreed to set up a similar arrangement between them, whereby Abreu would be advised by Mora, via telephone, that a "VIP" client needed service. Shortly thereafter, Abreu would receive a message on his beeper from the person in possession of the cash. The agent would be immediately alerted to the purpose of the message by the use of a code number. Abreu would then call the telephone number

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[1] Parenthetical references preceded by the letter "T" are to the pages of the trial transcript; those preceded by the letter "H" are to the pages of the suppression hearing transcript; those preceded by the letter "S" are to the pages of the sentence transcript.

indicated, make arrangements for delivery of the funds, and ultimately deposit them in the "Financial Consulting, Inc. Escrow Account". Mora, meanwhile, would already have blank checks from that account, pre-signed by Mazur, and, after confirmation of the deposit, would fill in the checks for the appropriate amount, less Mazur's commission of four percent. (T-80; 82; 88-98; 109-113)

On March 12, 1987, *Abreu* had a telephone conversation with Mora, during which Mora gave Abreu a telephone number to call in New York to arrange for a pick-up of $161,000.[2] At about 8:00 P.M. that evening, *Customs Special Agent Justo Diaz*, in the role of an associate of Agents Mazur and Abreu, had a telephone conversation with petitioner and arranged to meet him the next day at the Queens Shopping Mall on Queens Boulevard. (T-331-345) The next day, Diaz met Charria and received a box containing $173,000 currency. (T-346-348; 388)

On March 14th, Charria called Diaz and advised him that he (Charria) had mistakenly delivered $173,000 and requested that the excess $12,000 be returned to him. After confirming the error with his "people", Diaz agreed and returned the $12,000 to Charria later that day at the Queens Shopping Mall. (T-350-356)

The $161,000 were subsequently deposited with the Manufacturers Hanover Trust in the account of International Financial Consultants, Inc. Thereafter, the funds

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[2] The conversation was entirely in Spanish. At trial, the actual recording (Gov't Exhibit 211) was admitted in evidence (T-270) and an English transcript, prepared by Abreu was read to the jury. (T-271-278)

were "wire transferred" to the undercover account in the Florida National Bank in Tampa. Several checks, in varying amounts, were subsequently issued against those funds to a number of individuals. (T-397-399)[3]

A. The Arrest of Petitioner and the Search of His Home

On October 6, 1988 Indictment No. 88 Cr. 731 was filed, accusing Charria and others – see footnote 3, supra – of conspiring to distribute and to possess with intent to distribute five kilograms or more of cocaine (Count 1), and of "laundering of monetary instruments" (Counts 2 through 28). Charria was charged in the conspiracy count and in one substantive count, both charges based on his activities of March 13, and 14, 1987.

In the early morning hours of Sunday, October 9, 1988, *Special Agent Robert McCrossen* of the Customs Service led a team of 11 agents who set out to execute the arrest warrant issued on the indictment against Charria at

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[3] The March 13, 1987 delivery was the only occasion involving Charria. Subsequent deliveries were made during the course of the ensuing eighteen months by numerous other individuals, most of whose identity is yet unknown and who remain unapprehended. In fact, of the seventeen defendants named in the indictment, the identity of four was known. Defendant Alicia Valencia, who delivered $179,000 on April 13, 1987 (Count Three) pleaded guilty to the conspiracy count and was sentenced to two years imprisonment; defendant Fausto Enrique Munoz, who accompanied Valencia, pleaded guilty to Count 3 and was sentenced to one year and one day imprisonment. Abel Rivera, the only other identified defendant, was not apprehended.

his residence in Dix Hills, New York. The agents, who were in "raid" attire and armed, surrounded Charria's home and gained entry after his wife opened the door. (H-4-6) After being admitted, the agents went into the master bedroom where they found Charria, awake but still in his undergarments, his two children sleeping in the bed. The agents advised the defendant that he was under arrest for "money laundering", and "conspiracy to distribute cocaine", but gave him no further details about the charges. Among the questions immediately put to Charria by one of the agents was whether he had a weapon in the house, to which Charria replied in the negative. (H-9)

Shortly after, Agent McCrossen showed Charria the arrest warrant and had Agent Moskowitz administer *Miranda* warnings in English. (H-11) Another agent, Marzan, thereafter read the *Miranda* rights to Charria in Spanish, following which the defendant executed an acknowledgement and waiver of rights. (H-12-13) Several times during those preliminary discussions Charria asked "what is this all about", and stated he had done nothing wrong. (H-8; 17; 61-62) McCrossen repeated that petitioner was being arrested for money laundering and asked Charria for permission to search to look for "evidence of these crimes." (H-17) Charria agreed and signed consent to search forms prepared by the agents, but before the search began he informed the agents that he did, in fact, have a weapon locked in a file cabinet in his office in the basement. (H-18)

Charria led the agents to his office, produced the key for the cabinet and pointed to the exact location of the weapon, which was immediately seized by the agent.

(H-22) At that point the agents began to search the office, and on the floor near Charria's desk they located a folder containing a number of papers. The agent asked Charria what those documents were, to which the defendant replied "That's what will get me into trouble." (H-24-25) When asked to explain, Charria made no further comments.[4] The search of Charria's home continued, all the while the defendant fully cooperating. (H-26; 28)

Eventually, the search led the agents outside the house, to the driveway, where they observed a pile of ashes. Upon closer scrutiny, the agents saw burned fragments of papers similar to those contained in the folder they had found in defendant's office. When asked about them, Charria replied that the night before he had been outside and had burned his garbage in an effort to keep warm. (H-27-28)

B. The Sentence

Prior to sentence, the Probation Department prepared a guidelines analysis under the Sentencing Guidelines of the United States Sentencing Commission. Petitioner's total offense level was calculated at "41", calling for a

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[4] At trial the government contended, and the defense conceded, that the documents were "records" reflecting the transfer of large amounts of cocaine and related cash transactions by individuals whose identity could not be determined from the records. The government's theory was, not that appellant was directly involved in the drug transactions, but that he was the bookkeeper for those who were, and, as such, a member of the underlying conspiracy. The defense maintained, that the conspiracy reflected in the records was not the conspiracy charged in the indictment.

sentence range of 324-405 months (27-33 3/4 years) of imprisonment. The computation was based on the following factors:

1) the documents found in Charria's home reflected the transfer of "over 7,766 kilograms of cocaine" and "earnings of over $106,000,000", resulting in a "base offense level" of 36 under Sec. 2D1.1(a)(3) of the Guidelines;

2) Charria possessed a weapon during the commission of the crime, warranting a two-point enhancement under Sec. 2D1.1(b)(1) of the Guidelines;

3) Charria's initial, false denial about the weapon constituted an obstruction of justice, warranting an additional two-point enhancement under Sec. 3C1.1 of the Guidelines.

4) An additional point was added under Sec. 3D1.2(b) and 3D1.4 when the defendant's conduct under Count 2, a "closely related count" is "grouped" with the conduct under Count 1.

The Court concluded that the defendant had obstructed justice because "he lied to the agents about the documents and how they were burned, he lied to the agents about how he got the documents, and he initially lied about whether he had a gun, and in my judgment those three lies taken together amount to an obstruction of justice, and that is my finding." (S-20-21) As a result, the court imposed a twenty-five year sentence (300 months) on the conspiracy count and a concurrent ten year sentence on the money laundering count. (S-29-30)

C. The Appeal

On appeal to the Second Circuit, petitioner presented the same questions as are presented in this petition. With respect to the Sixth Amendment waiver, petitioner argued that informing the accused of the fact that he is under indictment and of its legal significance is minimally required to make any subsequent waiver of the right to counsel truly "knowing and intelligent." The Court of Appeals rejected that contention, holding that "giving an indicted defendant *Miranda* warnings is sufficient to make 'knowing and intelligent' his waiver of the sixth amendment right to counsel, even if the defendant has not been expressly informed of the indictment against him." (A-13-14).

As to Petitioner's claim that his act of destroying personal, incriminating documents before he was aware that an investigation or prosecution had begun is protected by the Fifth Amendment and therefore could not serve as a basis for sentence enhancement, the Court of Appeals ruled that the sentencing judge could properly consider defendant's "pre-arrest destruction of documentary evidence" as "obstructive conduct" under Sec. 3C1.1 of the sentencing guidelines. A-18 The Court did not specifically address Petitioner's Fifth Amendment claim, but merely noted that "Charria's remaining arguments . . . [are] without merit." A-18

REASONS WHY THE WRIT SHOULD BE GRANTED

POINT I

UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BEFORE AN INDICTED DEFENDANT MAY WAIVE HIS RIGHT TO COUNSEL HE MUST BE INFORMED OF THE FACT OF HIS INDICTMENT.

In *Patterson v. Illinois*, 487 U.S. 285 (1988), over the vigorous dissent of four Justices (Brennan, Marshall, Blackmun and Stevens), this Court held that *Miranda* warnings are sufficient to allow an indicted defendant to "knowingly and intelligently" waive his Sixth Amendment right to counsel, at least when the defendant, as was Patterson, is aware of his indictment. However, the Court specifically left open the question of whether the same is true when, as here, the defendant is ignorant of his indictment:

> Because, in this case, petitioner concedes that he was so informed, see Brief for Petitioner 3, *we do not address the question of whether or not an accused must be told that he has been indicted before a post-indictment Sixth Amendment waiver will be valid*. Nor do we even pass on the desirability of so informing the accused – a matter that can be reasonably debated. (Emphasis added)

Ibid, 487 U.S. at 295-296, n.8.

The question left open in *Patterson* is presented in this case, and, as the debate among the Justices in that case makes clear, is of constitutional significance and ought to be addressed by this Court.

The cornerstone of the majority's opinion in *Patterson* was the view that *Miranda* warnings give the accused all the information he needs to make a "knowing and intelligent" decision as to whether or not to waive his right to

counsel during post-indictment questioning. The majority reasoned that since the warnings tell the accused what his rights are and what the consequences of waiving them may be, – i.e., his statements may be used as evidence against him – there is nothing more he need be told.

But, as noted in the text (487 U.S. at 295) and in footnote 8 of its opinion, the Court's conclusion was grounded upon the assumption that the accused was informed of his indictment, that is to say, that he "had been formally charged with the murder of James Jackson" and thereby made aware of "the gravity of his situation".

The Court of Appeals' ruling in this case, however, holds that the commencement of formal proceedings against him is insignificant to the accused in determining whether to waive his right to counsel:

> Once an accused understands that he is under arrest and, after receiving the *Miranda* warnings, understands his right to remain silent, the potential consequences of speaking, and his right to counsel, including during interrogation, he is fully apprised of the information needed to make a knowing waiver of the sixth amendment right; providing him with the information that he is also under indictment, the desirability of which is debatable, *see Patterson*, 487 U.S. at 295-296, n.8, is not constitutionally required.

A-13.

But if, as recognized even in *Patterson*, the return of an indictment is an important step for the state – because it is then that it commits itself to prosecution of the accused – that step can have no less significance to the accused; and if, as also recognized in *Patterson*, for a waiver of a right to be valid the accused must "know

what he is doing so that his choice is made with eyes open" (487 U.S. at 293), it seems a rather self-evident proposition that the accused's level of knowledge must, at a minimum, include the fact that he has been indicted.

The need for such awareness on the part of the accused is vividly illustrated by what occurred in this case, for the bulk of the trial evidence against petitioner, and the totality of the information upon which his staggering sentence is based, came from *him* during his interrogation and the search of his home, to which he consented. What took place here was more than merely that his statement was used against him at trial; here petitioner made the prosecution's case.

In this regard, it is particularly significant that the agents never specifically interrogated Petitioner about the charges (or even explained them).[5] And by that time, the one act forming the basis of the indictment against Petitioner was eighteen months old. In their silence about the indictment, then, the agents denied Petitioner any basis for an informed waiver of his Sixth Amendment right to counsel.

The suggestion by the Court of Appeals that "even absent being informed that he was under indictment, the *Miranda* warnings gave Charria ample notice of the dangers of self-representation at a critical stage of the proceedings against him" (A-14) is self-contradictory:

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[5] It was revealed at trial that the agents were completely unfamiliar with the factual basis of the indictment. (T-606-607; 617)

without knowledge of his indictment Charria simply did not know he was in a "critical stage".

In the final analysis, even if it be difficult to fashion "a proper boilerplate set of warnings" because "the information that must be imparted to the accused will vary from case to case as the facts, legal issues, and parties differ" (Stevens, J., dissenting in *Patterson*, 487 U.S. at ___, n.4), informing the accused that he is under indictment is the very least that should be required, regardless of what else he is told.

POINT II

A DEFENDANT'S DESTRUCTION OF PERSONAL, ALBEIT INCRIMINATING, PAPERS PRIOR TO HIS AWARENESS THAT A CRIMINAL INVESTIGATION HAS COMMENCED, IS PROTECTED BY THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AND MAY NOT BE THE BASIS OF SENTENCE ENHANCEMENT UNDER THE SENTENCING GUIDELINES.

Petitioner apparently had prepared documents that reflected the distribution of substantial quantities of cocaine by third parties. Those documents were indisputably incriminating.[6] However, before he had any reason to know that an investigation of his activities, or of those of his alleged co-conspirators, had begun, Petitioner destroyed some of those records by burning them.

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[6] Similar papers found in petitioner's home during the search were introduced in evidence by the Government as proof of petitioner's membership in the charged conspiracy. Moreover, the information reflected in the papers was used to calculate petitioner's base offense level for sentence purposes.

The sentencing court deemed that act an obstruction of justice under Sec. 3C1.1 of the Sentencing Guidelines and enhanced Petitioner's sentence by 57 months.

Petitioner asserts, as he did below, that the act of destroying private, even if incriminating, documents is protected by the Fifth Amendment privilege against self-incrimination and cannot constitutionally serve as a sentence-enhancement factor.

It is beyond dispute that Petitioner had no obligation to maintain, or even create, documents reflecting his participation in a criminal venture. In the companion cases of *Marchetti v. United States*, 390 U.S. 39 (1968) and *Grosso v. United States*, 390 U.S. 62 (1968), this Court held that the Fifth Amendment privilege against self-incrimination precludes the Government from compelling an individual to maintain and then produce incriminating records, or from punishing him for failure to do so.

Similarly, in *Fisher v. United States*, 425 U.S. 391 (1976), this Court declared that the Self-Incrimination Clause protects an individual from complying with a subpoena for production of his personal records in his possession. See also, *Bellis v. United States*, 417 U.S. 85, 89-90 (1974).

It seems rather self-evident, then, that if Petitioner could not be punished for failing to create such records, and if he could not be punished for failing to produce them, he could not be punished for destroying them. In short, so long as the documents were in his private possession, the Fifth Amendment permitted Petitioner to do with them as he pleased without consequence.

Section 3C1.1 of the Guidelines, however, authorizes enhanced punishment if the defendant "impedes or obstructs, or attempts to impede or obstruct, the administration of justice during the investigation or prosecution of the instant offense". Application Note 1(a) to that section states that "destroying or concealing material evidence, or attempting to do so" may be a basis for applying that enhancement. Application Note 3, however, states that "[t]his provision is not intended to punish a defendant for the exercise of a constitutional right."

It is readily apparent, then, that the Court of Appeals' construction of that section is in conflict with both the Fifth Amendment privilege against self-incrimination, as construed by this Court in the cited cases, and with the qualifying provision of Application Note 3.

But beyond the Fifth Amendment aspect of the issue, the Court of Appeals' ruling is in apparent conflict with recent decisions from other circuits in analogous factual contexts. For example, in *United States v. Wilson*, 904 F.2d 234, 236 (1990), the Fifth Circuit reversed an obstruction of justice enhancement based upon the defendant's use of an alias during his commission of the crime. Said the Court,

> Were we to countenance an offense level increase in this instance, then consistency would demand that we permit it in a case in which the defendant wears a mask, where he disguises his voice, he leaves town, uses gloves, and so forth. This is not the type of conduct intended to be covered by Section 3C1.1

Following the *Wilson* rationale, the Fifth Circuit ruled in *United States v. Luna*, 909 F.2d 119 (1990), that the

defendant's attempt to conceal a weapon he had used in the commission of his crime did not constitute an obstruction of justice but an attempt to ensure that "his crime would go unpunished".

In *United States v. Fiala*, ___ F.2d ___, Docket Nos. 90-1489, 90-1551, decided March 28, 1991, the Seventh Circuit held that the defendant's false denial that he had anything illegal in his vehicle when stopped by a police officer did not constitute an obstruction.

Finally, in *United States v. Sanchez*, et al., ___ F.2d ___, Docket Nos. 89-2432/2433, decided March 28, 1991, the Sixth Circuit held that the defendants' attempt to avoid apprehension by vacating the apartment they had previously occupied once they learned of the arrest of their co-conspirator did not constitute an obstruction. Significantly, the Court noted that "neither [defendant] had any obligation to continue to reside at their known residence after the arrest of their co-conspirator, Gilberto Estevez." *Ibid*, slip op. at 13.

Here, Petitioner's act of destroying self-created, incriminating documents could not have been a wilful attempt to obstruct an existing investigation because he was completely unaware that the investigation then existed.[7] Rather, like the use of an alias or any of the other

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[7] The 1990 revisions to the commentary under Sec. 3C1.1 are instructive in this regard. Thus, Application Note 3(d), as revised, now provides that the destruction or concealment of material evidence constitutes obstruction if the act is committed or attempted "upon learning that an official investigation

(Continued on following page)

attempts described in the cited cases, petitioner's conduct was "a routine precaution any law violator might take" (*United States v. Wilson, supra*) to ensure that "his crime would go unpunished" (*United States v. Luna, supra*).

Petitioner respectfully submits the constitutional issue presented, as well as the apparent conflict between the Second Circuit's view of the obstruction of justice enhancement, as expressed in this case, and that of the other circuits cited above, are substantial reasons for this Court to grant certiorari. Rule 10.1(c), Rules of the Supreme Court of the United States.

(Continued from previous page)

has commenced or is about to commence". The revision also provides that if the destruction or concealment occurs contemporaneously with the defendant's arrest it does not constitute an obstruction of justice unless it results in a "material hindrance to the official investigation or prosecution of the instant offense of the sentencing of the offender."

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
May 16, 1991

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 5th day of February, one thousand nine hundred and ninety-one.

UNITED STATES OF AMERICA,

Appellee,

V

PEDRO J. CHARRIA,

Defendant-Appellant.

DOCKET NUMBER 90-1120

FILED FEBX 5 1991

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant Pedro J. Charria.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1516 – August Term, 1989
(Argued July 19, 1990 Decided December 3, 1990)
Docket No. 90-1120

UNITED STATES OF AMERICA,

Appellee,

– v. –

PEDRO J. CHARRIA,

Defendant-Appellant.

Before:

WINTER, MAHONEY and WALKER,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, John F. Keenan, *Judge*, convicting defendant after a jury trial of conspiracy to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 846 and 841(a)(1), and money laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i) and 2, and sentencing him to concurrent terms of imprisonment of twenty-five years and ten years, respectively.

Affirmed.

DOMENICK J. PORCO, New York, NY (Martin L. Schmukler, New York, NY, of counsel), *for Defendant-Appellant.*

STEPHEN C. ROBINSON, Assistant United States Attorney, New York, NY (Otto G. Obermaier, United States Attorney for the Southern District of New York, Kerri Martin Bartlett, Ass't United States Attorney, of counsel), *for Appellee.*

WALKER, *Circuit Judge*:

Pedro J. Charria appeals from a judgment of the United States District Court for the Southern District of New York (John F. Keenan, *Judge*), convicting him after a jury trial of conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846 and 841(a)(1), and money laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i) and 2, and sentencing him to concurrent terms of imprisonment of twenty-five years and ten years, respectively. Charria's principal challenge concerns his waivers of the right to counsel effected during his consents to questioning and to a search following his arrest pursuant to a filed indictment, as to the existence of which, he now says, he was never informed. He also challenges the district court's application of the Sentencing Guidelines' obstruction of justice and acceptance of responsibility adjustments, and its failure to downwardly depart. Because we find that the defendant's knowing and voluntary waivers of his sixth amendment right were constitutionally adequate and we conclude that Judge Keenan properly applied the Sentencing Guidelines, we affirm.

BACKGROUND

On October 6, 1988, following an extensive undercover operation, Charria and sixteen others were indicted

for conspiracy to distribute narcotics and various money laundering violations. According to the trial evidence, the sufficiency of which is not disputed, Charria, the New York accountant for a member of a Colombian drug cartel, conspired to distribute cocaine and conducted a transaction designed to conceal and disguise illegal narcotics proceeds. Of the remaining defendants, only two others have been apprehended to date; both pled guilty to a single count of money laundering prior to Charria's trial.

Circumstances of Charria's Arrest and the Search

On October 9, 1988, agents of the United States Customs Service arrived at Charria's home in Dix Hills, Long Island, with an arrest warrant. After knocking on the door and ringing the doorbell, the agents were let inside by the defendant's wife. Several of the agents, with guns drawn, entered the defendant's bedroom, where they found Charria in his underwear. The agents told him in English that he was under arrest and asked him if he had any weapons, to which he responded that he did not. They then took him to the kitchen, where they again told Charria that he was under arrest and showed him a copy of the arrest warrant, which indicated that he was under indictment for conspiracy to distribute cocaine and money laundering. Although he did not raise the issue below, Charria asserts on appeal that he was not adequately informed of the existence of indictment, despite testimony by two agents that, in addition to showing him a copy of the warrant, one of them explained to him that he was under indictment for the two offenses.

After viewing the arrest warrant, Charria began to reply, "I didn't do anything," but was interrupted by an agent who orally administered, in English and Spanish, the warnings prescribed by *Miranda v. Arizona*, 384 U.S. 436 (1966). At this juncture, no weapons were drawn and Charria was not handcuffed. Charria then signed "Advice of Rights" forms printed in both languages that waived his right to remain silent. He then told the agents that "he didn't know anything about any of those things, and [that] he was in the glass etching business."

Thereafter, the agents asked for, and received, Charria's oral consent to search his house. He also executed "Consent to Search" forms in English and Spanish. He thereupon admitted having a gun and directed the agents to a file cabinet in the basement where they found a weapon. The agents then discovered a Redweld envelope under Charria's desk, inches from where the gun had been seized, containing voluminous drug records. When one agent asked Charria about the contents of the envelope, Charria responded, "That's what's going to get me in trouble." The agents also found address books, receipt books, a beeper and a cellular telephone in the basement.

The agents then walked outside with Charria and noticed a pile of ashes in the driveway. Underneath the ashes, still in a readable condition, were other drug records matching those found in the Redweld envelope. Charria told the agents that he had burned those materials the night before when he was outside and wanted to keep warm. Similar records were found in a nearby garbage can. Attempting to explain the existence of the records, Charria told the agents that while he was on vacation in Colombia, two unknown men asked him if he

would store some financial records for someone in New York, and thereafter, a certain individual would beep him and arrange to meet him to transfer the records.

Charria's Suppression Motions in the District Court

Before trial, Charria filed a motion to suppress his oral statements and the physical evidence seized from his residence on the day of his arrest. The district court concluded that, despite the fact that he was under arrest and in custody, Charria had been neither coerced nor misled into consenting to the search or making the statements in violation of either the fourth or fifth amendments. Charria does not challenge the district court's finding of "voluntary and intelligent" waivers of these rights.

In a renewed suppression motion under the sixth amendment, Charria, relying on our decisions in *United States v. Satterfield*, 558 F.2d 655 (2d Cir. 1976), and *United States v. Mohabir*, 624 F.2d 1140 (2d Cir. 1980), raised the issue of whether the right to counsel during postindictment interrogation is compromised by law enforcement officials' obtaining uncounselled consents to questioning and search without first bringing the defendant before a neutral judicial officer for an explanation of the sixth amendment right. The district court ruled that, under *Patterson v. Illinois*, 487 U.S. 285 (1988), the sixth amendment does not require judicial supervision of a waiver of the right to counsel during postindictment questioning, and found that, after being given the appropriate *Miranda* warnings, Charria had made a knowing and intelligent waiver of his sixth amendment right, as well as his fourth

and fifth amendment rights. Charria does not press this argument on appeal, but instead asserts that for a sixth amendment waiver by an indicted defendant to be effective, the defendant must be informed of the indictment, which he now alleges never occurred.

Charria's Conviction and Sentence

The jury found Charria guilty on Count One of conspiring to distribute cocaine, in violation of 21 U.S.C. §§ 846 and 841(a)(1), and on Count Two of money laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i) and 2. Judge Keenan imposed concurrent prison terms of 25 years on Count One and 10 years on Count Two, plus a $50,000 fine and five years supervised release on Count One. Unlike the sentence on Count Two, which alleged conduct prior to the November 1, 1987 effective date of the Sentencing Guidelines, the sentence on Count One was governed by the Guidelines as the conspiracy continued past that date. The district court based Count One's 25-year prison term upon an adjusted offense level of 40 which, at the criminal history category I applicable to Charria, carries a range of incarceration of 292 to 365 months. Level 40 was arrived at from: (a) the documents found in Charria's home that reflected the transfer of over 7,766 kilograms of cocaine and earnings of over $106 million and resulted in a base offense level of 36 under Guidelines § 2D1.1(a)(3); (b) Charria's possession of a weapon during the commission of the crime that resulted in a two-point enhancement under § 2D1.1(b)(1); and (c) a two-point enhancement for obstruction of justice under § 3C1.1 based upon Charria's burning of drug records

and his attempt to deceive the arresting agents by initially denying having a weapon and by lying about how the documents became burned and how he acquired them. The district court declined to award Charria a two-level reduction for acceptance of responsibility under § 3E1.1, and to downwardly depart from the Guidelines range.

DISCUSSION

I. Sixth Amendment Right to Counsel

On appeal, Charria contends that his waivers of his sixth amendment right to counsel during the postindictment questioning and search of his house were ineffective because the arresting officers did not inform him of the indictment pending against him, and therefore the fruits of that questioning and search should have been suppressed at trail.[1] Charria does not challenge the fact that he was not brought before a neutral judicial officer prior to his waiver. Nor does he assert that he was never given the appropriate *Miranda* warnings. He asserts only that in order for an indicted defendant to effectively waive the

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[1] We assume for purposes of this appeal the truth of Charria's appellate claim that he was not informed of the pending indictment. We note, however, that although the district court made no finding on this issue, there is evidence in the record – the notation on the arrest warrant and the testimony of the agents – from which the district court, if asked, could have found that the defendant was so informed. If the result of this appeal turned on whether the defendant was so informed, we would remand for a hearing and finding. As it does not, we do not.

right to counsel he must, in addition to being advised of his *Miranda* rights, be informed by an arresting officer of the indictment pending against him. The sole issue before us, therefore, is whether an indicted defendant who has been given the *Miranda* warnings but not informed of the indictment against him may waive the right to counsel when consenting to custodial questioning and a search of his home.

The sixth amendment assures a defendant the benefit of assistance of counsel if desired at any "critical stage" of the criminal proceedings against him. *Michigan v. Jackson*, 475 U.S. 625, 632 & n.5 (1986); *Maine v. Moulton*, 474 U.S. 159, 170 (1985); *United States v. Kon Yu-Leung*, 910 F.2d 33, 37-38 (2d Cir. 1990); *Meadows v. Kuhlmann*, 812 F.2d 72, 75-76 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987). Accordingly, when evaluating the sufficiency of a defendant's waiver of sixth amendment rights, "the pivotal threshold question" is whether the waiver occurred at a critical stage of a criminal proceeding. *Kon Yu-Leung*, 910 F.2d at 38. Any stage of a criminal prosecution " 'where absence of defense counsel or lack of advice might derogate from the accused's right to a fair trial' " is critical. *See id.* (quoting *United States v. Jackson*, 886 F.2d 838, 843 (7th Cir. 1989)). Even at a critical stage, however, the sixth amendment right to counsel can be knowingly and voluntarily waived by a criminal defendant who has been made fully aware of the nature of the right being abandoned and the consequences of abandonment. *Patterson v. Illinois*, 487 U.S. 285, 292-97 (1988); *see also Moran v. Burbine*, 475 U.S. 412, 421 (1986); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

As to each of the two sixth amendment waivers effected by Charria – his waiver of the right to counsel during consent to questioning and his waiver of the right to counsel during consent to a search – we face a two-stage inquiry: was the waiver given at a critical stage where the right to counsel attached and, if so, could Charria have effectively waived the right to counsel after being apprised of his *Miranda* rights without being informed of the indictment pending against him? Of course, if there was no critical stage, then Charria has no sixth amendment claim.

There can be no doubt that Charria had the right to have the assistance of counsel when he consented to postindictment questioning by law enforcement authorities. *See Patterson v. Illinois*, 487 U.S. at 290; *Michigan v. Jackson*, 475 U.S. at 629-30. Regarding his consent to the search of his home, we have held that in at least some circumstances a postindictment consent to search is not a critical stage implicating the sixth amendment right. *See Kon Yu-Leung*, 910 F.2d at 39-40. Arguably, Charria's consent to search was a critical stage because it was intertwined with postindictment interrogation. *See id.* at 40 (consent to search not critical in part because, "[n]o evidence was generated, as in the case of incriminating testimony, that was not already in existence and virtually certain to be available to the government in due course."). However, we need not decide whether the consent to search in this case was a critical stage because we find that Charria had validly waived any right to counsel he may have had at that time, as well as the right that had certainly accrued during the questioning itself.

The Supreme Court has counselled us to be "pragmatic" in assessing whether the sixth amendment right has been properly waived. *Patterson*, 487 U.S. at 298. Factors that bear on the adequacy of a sixth amendment waiver include:

> the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel. An accused's waiver of his right to counsel is "knowing" when he is made aware of these basic facts.

Id. *Patterson's* pragmatic approach supersedes previous rulings of this circuit which, based on the concept of a hierarchy of constitutional rights, called for a higher "knowing and intelligent" standard for sixth amendment waivers than for other waivers. We had established that, in order to effectively waive the right to counsel during postindictment questioning, an accused had to be informed of his indictment – including the significance thereof – by a neutral judicial officer. *United States v. Mohabir*, 624 F.2d 1140, 1146-53 (2d Cir. 1980); *Carvey v. LeFevre*, 611 F.2d 19, 21-22 (2d Cir. 1979), *cert. denied*, 446 U.S. 921 (1980); *United States v. Satterfield*, 558 F.2d 655, 657 (2d Cir. 1976).

Patterson held that *Miranda* warnings sufficed for a "knowing and intelligent" waiver of the sixth amendment right to counsel during postindictment questioning, and consequently rejected the contention, citing *Mohabir*, that the sixth amendment right to counsel is "superior" to or "more difficult" to waive than its fifth amendment counterpart. *See* 487 U.S. at 292-300. Despite *Patterson*, Charria contends that this Circuit should continue to adhere, at

least partially, to its now-outmoded hierarchy-of-rights analysis. While Charria concedes that, after *Patterson*, an indicted defendant no longer need be brought before a neutral judicial officer in order to waive the right to counsel during questioning, *see Patterson*, 487 U.S. at 295-96 n.8, he notes that the Supreme Court left open the issue of whether an accused must be informed that he has been indicted before a postindictment sixth amendment waiver will be valid. *See id.*[2]; *see also Kon Yu-Leung*, 910 F.2d at 40. Charria urges that even after *Patterson* arresting officers must advise defendants of any pending indictments before soliciting sixth amendment waivers.

Accepting that Charria was not informed of the indictment against him, *see supra* n.1, we believe that his argument would make a patchwork of the law in this area – retaining procedures premised on the need to effect a supposed "distinction between Fifth and Sixth Amendment rights," *Mohabir*, 624 F.2d at 1147, after the Supreme Court has recognized that "there [is no] support . . . for the notion that because a Sixth Amendment right may be involved, it is more difficult to waive than the Fifth Amendment counterpart." *Patterson*, 487 U.S. at 297-98. *Patterson* counsels a shift in sixth amendment waiver

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[2] Beyond leaving open the question of the necessity of informing an accused of a pending indictment before a sixth amendment waiver is solicited, the Supreme Court expressly rejected *Mohabir's* holding that some "additional" warnings or discussions with an accused, other than those compelled by *Miranda*, are required to effectuate a sixth amendment waiver during postindictment questioning, or that any waiver in this context can only properly be made before a neutral judicial officer. 487 U.S. at 295-96 n.8.

analysis away from the abstract importance of the right to counsel and toward a practical inquiry into:

> what purposes a lawyer can serve at the particular stage of the proceedings in question and what assistance he could provide to an accused at that stage [in order] to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized.

Id. at 298. Charria's argument would undermine this shift, and, further, is inconsistent with *Patterson's* conclusion that *Miranda* warnings suffice to effect a valid sixth amendment waiver during postindictment questioning. Once an accused understands that he is under arrest and, after receiving the *Miranda* warnings, understands his right to remain silent, the potential consequences of speaking, and his right to counsel, including during interrogation, he is fully apprised of the information needed to make a knowing waiver of the sixth amendment right; providing him with the information that he is also under indictment, the desirability of which is debatable, *see Patterson*, 487 U.S. at 295-96 n.8, is not constitutionally required.

As there is no "substantial difference between the usefulness of a lawyer to a suspect during [preindictment] custodial interrogation, and his value to an accused at postindictment questioning," *id.* at 299, we hold that giving an indicted defendant *Miranda* warnings is sufficient to make "knowing and intelligent" his waiver of the sixth amendment right to counsel, even if the defendant

has not been expressly informed of the indictment pending against him.[3]

Under *Patterson's* pragmatic approach, Charria's waivers were constitutionally adequate. The dangers of self-representation during Charria's consent to questioning were simple, obvious and intuitive. During postindictment questioning, "a lawyer's role is rather unidimensional: largely limited to advising his client as to what questions to answer and which ones to decline to answer." *Id.* at 294 n.6. Even absent being informed that he was under indictment, the *Miranda* warnings gave Charria ample notice of the dangers of self-representation at a critical stage in the proceedings against him.

Charria's attempt to limit *Patterson's* import to postindictment questioning, as opposed to a consent to search, is unavailing. There is nothing in *Patterson* to suggest that the *Miranda* warnings found adequate in the postindictment questioning context would not also suffice for a consent to search, or that a postindictment waiver regarding a consent to search mandates a higher "knowing and intelligent" standard than a waiver regarding a consent to questioning.

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[3] The record does not disclose, and Charria does not allege, that he had retained or accepted the appointment of a lawyer to represent him at the time he consented to questioning and the search, and thus the "distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship" that attach to a defendant once counsel has in fact been retained are inapplicable. *Patterson*, 487 U.S. at 290 n.3, 296-97 n.9.

If during postindictment questioning a lawyer's role is limited to advising his client which questions to answer, the same limited role obtains regarding a postindictment search. After consenting to a search, a defendant is a purely passive player and requires no " 'aid in coping with legal problems or assistance in meeting his adversary.'" *Id.* at 298 (quoting *United States v. Ash*, 413 U.S. 300, 313 (1973)). Beyond advising a client not to consent to a search, the advocate's role is an extremely limited one during this phase of the criminal proceedings. Moreover, Charria clearly understood the dangers to him associated with the search, as he initially lied to the arresting agents about having a gun, attempted to destroy drug records, and referred to the documents in the house as something that was "going to get me in trouble."

Accordingly, we hold that, in connection with his postindictment questioning and consent to search, Charria's waivers to the arresting officers of his sixth amendment right to counsel were effective.

II. Application of Sentencing Guidelines

On appeal, Charria renews his attempt to reduce his adjusted offense level under the Guidelines, claiming that he was entitled to a two-point reduction for acceptance of responsibility and did not deserve a two-level enhancement for obstruction of justice. Failing this, he also urges that the district court should have downwardly departed, asserting that the Guidelines sentence was unreasonably harsh given his allegedly minor role in the offenses.

The argument that the district court impermissibly failed to downwardly depart from the Guidelines is easily

disposed of; it is unreviewable, absent a showing that a violation of law occured or that the Guidelines were misapplied. *United States v. Adeniyi*, 912 F.2d 615, 618-19 (2d Cir. 1990); *United States v. Colon*, 884 F.2d 1550, 1552 (2d Cir.), *cert. denied*, 110 S. Ct. 553 (1989). There is no such showing here.

We address the district court's application of the acceptance of responsibility and obstruction of justice provisions mindful that we must "accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts." 18 U.S.C. § 3742(e) (1988). Thus while purely legal issues arising from the interpretation of the Guidelines are reviewed *de novo*, the district court's interpretation of facts and application of clear standards to those facts are reviewed under a "clearly erroneous" standard. *See United States v. Shoulberg*, 895 F.2d 882, 884 (2d Cir. 1990); *United States v. Stroud*, 893 F.2d 504, 506-07 (2d Cir. 1990); *United States v. Moskowitz*, 888 F.2d 223, 227-28 (2d Cir. 1989) [*Moskowitz II*]; *United States v. Moskowitz*, 883 F.2d 1142, 1155 (2d Cir. 1989).

Noting that a reduction for acceptance of responsibility under Guidelines § 3E1.1 is available notwithstanding the fact that a defendant exercises his constitutional right to a jury trial, *see* § 3E1.1(b) and Application Note 2, Charria reasons that because he did not contest certain parts of the government's case in chief at trial, he is entitled to the reduction for having voluntarily admitted his involvement in the offense charge. *See id.* at Application Note 1(c). Charria also urges that by consenting to a search of him home and by admitting to

one of the arresting agents that certain recovered documents would get him in trouble, he "voluntar[ily] assist[ed] [the] authorities in the recovery of the fruits and instrumentalities of the offense." *Id.* at Application Note 1(e).

The district court's determination that there was no acceptance of responsibility by Charria was not clearly erroneous. At no time did Charria voluntarily admit his guilt. Instead, during a presentence interview, he characterized himself as a pawn, despite the extensive drug records under his control, and referred to his involvement in the conspiracy as a set of "isolated acts." *See Moskowitz II*, 888 F.2d at 227; *United States v. Ortiz*, 878 F.2d 125, 128 (3d Cir. 1989). The district court was free to discount the last-minute expression of remorse by the defendant, *see United States v. Rios*, 893 F.2d 479, 481 (2d Cir. 1990); *United States v. Barreto*, 871 F.2d 511, 513 (5th Cir. 1989), and to conclude that Charria's cooperation with the arresting agents was motivated by self interest rather than genuine contrition. *See United States v. Spraggins*, 868 F.2d 1541, 1543 (11th Cir. 1989).

In making his obstruction determination under § 3C1.1, the district court found the Charria "burned records, he lied to the agents, and in my judgment, he clearly obstructed justice." Expanding on this ruling, the court stated the Charria "lied to the agents about the documents and how they were burned, he lied to the agents about how he got the documents, and he initially lied about whether he had a gun, and in my judgment those three lies taken together amount to an obstruction of justice. . . . " This finding was not clearly erroneous.

In challenging the district court's obstruction enhancement, Charria first argues that he quickly recanted his initial false statement to the agents regarding possession of a gun, and thus he should not be punished for a moment's indiscretion. However, in determining whether Charria's overall conduct was calculated to mislead or deceive the authorities, *see United States v. Irabor*, 894 F.2d 554, 556 (2d Cir. 1990); *United States v. White*, 903 F.2d 457, 463 (7th Cir. 1990), a sentencing judge may weigh evidence of even a quickly recanted lie. Here, the district court's finding plainly encompassed more than just this lie; it included the lies concerning the drug records and the attempt to destroy some of those documents. *See Irabor*, 894 F.2d at 556 (prearrest destruction of documentary evidence warrants § 3C1.1 increase as guideline applies to obstructive conduct both before and after initiation of formal proceedings against defendant).

We have considered Charria's remaining arguments and find them without merit. The judgment of the district court is affirmed.

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, -against- PEDRO J. CHARRIA, et al., Defendant.	S 88 Cr. 731 (JFK) OPINION and ORDER

APPEARANCES:

For the United States of America:
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Of Counsel: Stephen C. Robinson, Esq.
Assistant United States Attorney

For the Defendant:
Miller & Forman, P.A.
Miami, Florida
of Counsel: A. Scott Miller, Esq.

JOHN F. KEENAN United States District Judge

JOHN F. KEENAN, United States District Judge:

On April 12 and 13, 1989, the Court heard testimony from both sides relative to the defendant's motion to suppress physical evidence.

On the early morning of Sunday, October 9, 1988, Agents of the United States Customs Service arrived at the home of the defendant in Dix Hills, Long Island with

an arrest warrant. Having knocked on the door and rung the doorbell, they were admitted by the defendant's wife. Several of the Agents, with guns drawn, went to the defendant's bedroom where they found him in his underwear. It is undisputed that they told him he was under arrest and took him to the kitchen, where he was given hin *Miranda* warnings in both English and Spanish. He was also given written "Advice of Rights. forms in both English and Spanish which he signed. He was also given "Consent to Search" forms both in English and Spanish which he signed. The defendant maintains that he did not really understand any of the forms and that his knowledge of English is limited.

The Court concludes that the defendant's ability to understand English is much greater than he admitted in Court at the hearing. Moreover, the contention that he was coerced into consenting to the search and that he agreed to do what the Agents wanted is belied by the fact that when initially questioned as to whether he had a gun at the premises, he lied and said he did not. The fact that the defendant was under arrest and in custody does not preclude the voluntary agreement on his part to permit the Agents to search.

The Court concludes that his consent to search was voluntarily given. *United States v. Faruolo*, 506 F.2d 490 (2d Cir. 1974); *United States v. Crespo*, 834 F.2d 267 at 271, 272 (2d Cir. 1987).

SO ORDERED.

Dated: New York, New York
April 18, 1989

/s/ _____
JOHN F. KEENAN
U.S.D.J.

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, -against- PEDRO J. CHARRIA, Defendant.	S 88 Cr. 731 (JFK) OPINION and ORDER

APPEARANCES:

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New York, New York

JOHN F. KEENAN United States District Judge

JOHN F. KEENAN, United States District Judge:

Defendant Pedro Charria renews his application before this Court to suppress evidence obtained and statements made during the course of the execution of an arrest warrant at his home in Dix Hills, Long Island. By opinion and order dated April 18, 1989 this Court denied

defendant's previous motion to suppress, finding that the defendant had consented to the search of his home and had voluntarily given statements to Agents of the United States Customs Service after *Miranda* warnings were administered in both English and Spanish. The defendant's earlier application challenged the Agents' actions under the fourth and fifth amendments only. The defendant's counsel now asserts that he overlooked a sixth amendment challenge to the evidence obtained pursuant to the arrest and moves to suppress the evidence on that ground.

The defendant argues that his consent to search his home was invalid and his post-arrest statements should be suppressed because they were obtained in violation of the sixth amendment right to counsel of defendant who had already been indicted when the Agents arrested him. The defendant principally relies on *Satterfield v. United States*, 558 F.2d 655 (2d Cir. 1976), which held that the sixth amendment barred the use of incriminating statements obtained from an indicted defendant, even if the defendant is aware of the indictment and has been given *Miranda* warnings, absent a knowing and intelligent waiver of the sixth amendment right to counsel. *Id.* at 657. The Second Circuit clarified the import of *Satterfield* in *United States v. Mohabir*, 624 F.2d 1140, 1153 (2d Cir. 1980), holding that "a valid waiver of the Sixth Amendment right to have counsel present during post-indictment interrogation must be preceded by a federal judicial officer's explanation of the content and significance of the right."

The Government concedes that the law as described above would require suppression here. The Government

contends, however, that *Patterson v. Illinois*, 108 S.Ct. 2389 (1988) overruled *Satterfield* and its progeny and approved post-indictment consents to search and statements by a defendant in the absence of judicial supervision. The Court agrees.

In *Patterson*, the Supreme Court considered whether an indicted individual who has been given *Miranda* warnings and waived his right to silence and to have a lawyer present during questioning may knowingly and intelligently waive his sixth amendment right to counsel in counsel's absence. Holding that while a searching, judicially-supervised inquiry is necessary before a defendant may validly waive his right to counsel at trial, the Supreme Court stated:

> it is our view that whatever warnings suffice for *Miranda*'s purposes will also be sufficient in the context of postindictment questioning. The State's decision to take an additional step and commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning, or expand the limited purpose that an attorney serves when the accused is questioned by authorities. With respect to this inquiry, we do not discern a substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at postindictment questioning.

Id. at 2398.

Guided by this ruling, it is clear that the defendant here could and in fact did waive his right to have counsel present at his post-arrest questioning notwithstanding his pre-arrest indictment. As the Court found in its prior

opinion and order, the defendant gave a voluntary and intelligent waiver of his right to remain silent after his arrest and freely consented to the search of his home.

CONCLUSION

For the reasons stated above, the Court denies the defendant's motion to suppress. The parties are reminded that a firm trial date of July 10, 1989 has been established for this case.

SO ORDERED.

Dated: New York, New York
July 5, 1989

/s/ John F. Keenan
JOHN F. KEENAN
U.S.D.J.

(2)

No. 90-1794

Supreme Court, U.S.
FILED
JUL 22 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

PEDRO J. CHARRIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner knowingly and intelligently waived his Sixth Amendment right to counsel.

2. Whether the Fifth Amendment privilege against compelled self-incrimination permits an individual to destroy evidence.

3. Whether destruction of evidence by a defendant before he has knowledge of the existence of a criminal investigation, coupled with false statements to investigating officers, may be considered an "obstruction of justice" under Sentencing Guidelines § 3C1.1.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1794

PEDRO J. CHARRIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals' opinion (Pet. App. A2-A18) is reported at 919 F.2d 842.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 1990. A petition for rehearing was denied on February 5, 1991. Pet. App. A1. The petition for a writ of certiorari was filed on May 21,

1991, and therefore is out of time pursuant to Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the Southern District of New York, petitioner was convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846 and 841(a)(1), and money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i) and 1956(a)(2). He was sentenced to 25 years' imprisonment for the conspiracy offense under the Sentencing Guidelines, to be followed by five years' supervised release, and to a concurrent non-Guideline sentence of ten years' imprisonment for the money laundering offense. Pet. App. A7. The court of appeals affirmed. Pet. App. A2-A18.

1. Petitioner was the New York accountant for a member of a Colombian drug cartel. Petitioner conspired to distribute cocaine and conducted a transaction designed to conceal and disguise illegal narcotics proceeds. Pet. App. A4.

On October 9, 1988, shortly after petitioner had been indicted, United States Customs Service agents came to his home in Dix Hills, Long Island, with an arrest warrant. After knocking on petitioner's door and ringing his doorbell, the agents were let inside the home by petitioner's wife. Several of the agents, with guns drawn, entered petitioner's bedroom, where they found him in his underwear. The agents told him that he was under arrest and asked if he had any weapons. Petitioner responded that he did not. Petitioner was taken to the kitchen, where he was again told that he was under arrest. He was shown a copy of the arrest warrant, which indicated that he was under indictment for conspiracy to distribute

cocaine and money laundering. Two agents testified that, in addition to showing petitioner a copy of the arrest warrant, one of the agents explained to petitioner that he was under indictment. Pet. App. A4.

After viewing the arrest warrant, petitioner began to reply, "I didn't do anything," but was interrupted by an agent who orally administered *Miranda* warnings in English and Spanish. At this juncture, no weapons were drawn and petitioner was not handcuffed. Petitioner then signed an advice-of-rights form printed in English and Spanish that waived his right to remain silent. He then told the agents that "he didn't know anything about any of those things, and [that] he was in the glass etching business." Pet. App. A5.

Thereafter, the agents asked for and received petitioner's oral and written consent to search his house. He admitted having a gun and directed the agents to a file cabinet in the basement where they found a weapon. The agents also discovered an envelope under petitioner's desk containing extensive drug records. When asked about the records, petitioner responded, "That's what's going to get me in trouble." After a further search, the agents found address books, receipt books, a beeper, and a cellular telephone in the basement. Pet. App. A5.

The agents then went outside with petitioner and noticed a pile of ashes in the driveway. Underneath the ashes, still in readable condition, were other drug records matching those found in the envelope in the basement. Petitioner told the agents that he had burned those materials the night before when he was outside and wanted to keep warm. Similar records were found in a nearby garbage can. To explain the existence of all the records, petitioner told the agents

that while he was on vacation in Colombia, two unknown men asked him if he would store some financial records for someone in New York until that person contacted him and arranged to pick up the records. Pet. App. A5-A6.

2. Before trial, the district court denied petitioner's motions to suppress his statements and the physical evidence seized from his residence at the time of his arrest. The court rejected petitioner's Fourth, Fifth, and Sixth Amendment challenges to the admission of this evidence. At sentencing, the district court enhanced the base offense level under the Sentencing Guidelines by two offense levels under Sentencing Guidelines § 3C1.1 for obstructing justice by burning the drug records, denying in his initial questioning that he had a weapon, and lying about both his acquisition of the documents and his reasons for destroying them. Pet. App. A7-A8.[1]

3. The court of appeals affirmed petitioner's convictions and sentence. The court rejected petitioner's claim, made for the first time before the court of appeals (see Pet. App. A7), that his waiver of his Sixth Amendment right to counsel on the indicted offenses was invalid because he was not informed

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[1] Petitioner's drug conspiracy offense had a base offense level of 36 under Sentencing Guidelines § 2D1.1(a)(3), which was enhanced two offense levels for possession of the firearm under Sentencing Guidelines § 2D1.1(b)(1) as well as two offense levels for the obstruction of justice. Petitioner was denied a two level reduction for acceptance of responsibility under Sentencing Guidelines § 3E1.1. Petitioner's sentencing range for an offense level of 40 and a criminal history category of I was 292-365 months, within which the district court imposed a sentence of 300 months. Pet. App. A7-A8.

that he was under indictment.[2] Pet. App. A8-A15. Although there was substantial evidence that petitioner had in fact been told that he was under indictment when he waived his right to counsel, the court of appeals assumed for purposes of the appeal that petitioner was not aware that he was under indictment at the time he executed the waiver form. Pet. App. A4, A8 & n.1.

Following the analysis of *Patterson* v. *Illinois*, 487 U.S. 285, 292-297 (1988), the court held that "the sixth amendment right to counsel can be knowingly and voluntarily waived by a criminal defendant who has been made fully aware of the nature of the right being abandoned and the consequences of the abandonment." Pet. App. A9. Because, in the court's view, the *Miranda* warnings petitioner received fully apprised him of the nature of his right to counsel and the consequences of its abandonment, petitioner's waiver of that right under the Sixth Amendment was effective. Pet. App. A14-A15.

The court of appeals also rejected petitioner's argument that the district court improperly adjusted his base offense level under Sentencing Guidelines § 3C1.1 for obstructing justice. Pet. App. A18. The court held that the district court's factual determinations were not clearly erroneous and that the fact that petitioner quickly recanted his false statement regarding the gun did not render the adjustment invalid. Pet. App. A17-A18.

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[2] Petitioner alleged merely that his waiver was uninformed; he did not challenge on appeal the district court's finding that the waiver was "voluntary and intelligent." Pet. App. A6.

ARGUMENT

1. Petitioner contends (Pet. 11-14) that a waiver of the right to counsel executed by a defendant who does not know that he is under indictment is ineffective.

Initially, this case is not an appropriate vehicle for this Court to address the question petitioner seeks to present. Petitioner did not claim in the district court that he was unaware of his indictment at the time he waived his right to counsel. Pet. App. A4. There is therefore no factual predicate for the claim petitioner seeks to raise.[3]

In any event, petitioner's legal claim is without merit. In *Patterson* v. *Illinois*, 487 U.S. 285, 292-297 (1988), this Court held that *Miranda* warnings, although intended to protect a defendant's Fifth Amendment rights, could suffice to make a defendant aware of the nature of his Sixth Amendment right to counsel and the consequences of waiving that right. In such circumstances, the Court held, a waiver of the right to counsel in response to *Miranda* warnings could be a knowing and intelligent waiver of the Sixth Amendment right to counsel. *Ibid.*

While *Patterson* did not expressly decide whether an accused must be told that he is under indictment in order for his waiver to be effective, see 487 U.S. at 295-296 n.8, the analysis of *Patterson* compels the conclusion that, under the specific circumstances of this case, petitioner's claim has no merit. *Patterson*'s holding is based on the proposition that a waiver executed by an accused who understands the nature

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[3] The material that is in the record suggests that petitioner was informed that he was under indictment when he waived his right to counsel. See Pet. App. A4, A8 n.1.

of the right to counsel and the consequences of a waiver of that right is a knowing and intelligent waiver. Petitioner was adequately informed by the *Miranda* warnings that he had a right to have counsel present before being questioned and that his waiver of that right might result in his statements being used against him at trial. Moreover, the fact that he was being arrested and the presence of a number of armed agents on the scene put petitioner on notice of the seriousness of his situation. Like the defendant in *Patterson*, petitioner cannot identify any meaningful additional information that would have been required to make his waiver knowing and intelligent.

2. Petitioner also asserts (Pet. 14-18) that his Fifth Amendment right against compulsory self-incrimination precludes adjustment of his base offense level for obstruction of justice behavior. That assertion is mistaken.

First, petitioner's claim is not properly before this Court. Although in the court of appeals petitioner challenged the application of Sentencing Guidelines § 3C1.1 to enhance his sentence, petitioner did not raise before that court his current claim that his Fifth Amendment privilege against compulsory self-incrimination precluded adjustment of his offense level under Section 3C1.1. See Pet. App. A18; Pet. C.A. Br. 20-23.

In any event, petitioner's claim that he had a constitutional right to destroy records detailing drug transactions is frivolous. None of the cases cited by petitioner (Pet. 15) provides support for that claim. *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), involved convictions for failing to register for and pay excise

taxes on wagering, where registration for and payment of the tax would have required the defendants to submit forms to the government admitting that they had violated gambling laws. Although *Fisher* v. *United States*, 425 U.S. 391 (1976), held that in some circumstances an individual may not be compelled to comply with a subpoena duces tecum requiring production of personal records in his possession, the fact that an individual cannot be compelled to produce such records does not suggest that he has a constitutional privilege to destroy them. Cf. *Andresen* v. *Maryland*, 427 U.S. 463 (1976) (individual may not assert Fifth Amendment right against compulsory self-incrimination to preclude seizure of business records from his offices). In short, although the Fifth Amendment protects individuals from being compelled to provide incriminating evidence against themselves, it has never been interpreted to make destruction of evidence a privileged act.

3. Petitioner claims (Pet. 17 & n.7) that his destruction of evidence before he knew that he was under investigation and his false statements to police officers were improperly used to enhance his sentence under Sentencing Guidelines § 3C1.1.

a. First, petitioner's claim that his destruction of documents was improperly used to enhance his sentence is not properly before the Court. Petitioner did not assert below that he was unaware that he was under investigation at the time he destroyed the records, see Pet. C.A. Br. 20-23, and the court of appeals consequently did not pass upon his claim that his alleged lack of awareness precluded the application of Guidelines § 3C1.1. Therefore, he may not now assert that his lack of awareness of a pending investigation precluded an upward adjustment under Guidelines § 3C1.1.

Second, petitioner's burning of some records and discarding of others, coupled with his improbable explanation that he set the fire to keep warm, provided sufficient evidence to support an inference that petitioner was aware that there was an ongoing investigation at the time he destroyed the records. Therefore, the district court's application of Guidelines § 3C1.1, even under petitioner's theory, was correct.

Third, insofar as any issue concerning the interpretation of the Guidelines is raised by petitioner's claim concerning destruction of documents, it has no continuing significance. As petitioner points out (Pet. 17 n.7), the revised Commentary to Section 3C1.1, effective November 1, 1990, makes clear that destruction of evidence may be used to enhance a sentence under Section 3C1.1 only if the act was committed or attempted "upon learning that an official investigation has commenced or is about to commence."

b. Insofar as petitioner's objection to his upward adjustment is based on his claim that the district court ought not have taken into account his false statements to Customs agents, his objection is also meritless. As the court of appeals recognized, "a sentencing judge may weigh evidence of even a quickly recanted lie." Pet. App. A18. That is particularly true where, as here, petitioner in addition made other false statements that were not recanted and destroyed relevant documentary evidence. See *ibid.*

The court of appeals' conclusion that the district court properly applied the Guidelines in this case does not conflict with *United States* v. *Fiala*, 929 F.2d 285 (7th Cir. 1991). In *Fiala*, the defendant was driving a car when he was stopped by a state trooper who inquired whether the defendant had any-

thing illegal in the car. The defendant responded that he did not. *Id.* at 286. The Seventh Circuit held that the defendant's sentence could not be enhanced under Guidelines § 3C1.1 for his simple denial of guilt. *Id.* at 289-290.

Even if correct, the decision of the Seventh Circuit in *Fiala* does not support petitioner's claim. Unlike the statements in *Fiala*, petitioner's statements were not simple exculpatory denials. Petitioner lied to Customs agents concerning one potentially crucial fact—the existence of a weapon on the scene—that was unrelated to his guilt or innocence of the charges under investigation. In addition, he told an elaborate, if improbable, story concerning his destruction of documents that also went well beyond a simple denial that he was guilty.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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